

Hearing Date: June 17, 2014
Hearing Time: 10:00 A.M.

SPIZZ COHEN & SERCHUK, P.C.
Attorneys for First Central Savings Bank, Defendant
425 Park Avenue
New York, NY 10022
Alex Spizz, Esq.
Jill Makower, Esq.
(212) 754-9400

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: _____ x

11 EAST 36TH, LLC, Chapter 11
Case No. 13-11506 (RG)
Debtor.

In re: _____ x

MORGAN LOFTS, LLC, Chapter 11
Case No. 13-11507 (RG)
Debtor. (Jointly Administered)

11 EAST 36TH, LLC, _____ x

Plaintiff, Adv. Pro. No. 14-01819 (RG)

v.

FIRST CENTRAL SAVINGS BANK,
11 EAST 36TH NOTE BUYER LLC, and
MISSION CAPITAL ADVISORS LLC,

Defendants.

_____ x

**NOTICE OF FIRST CENTRAL SAVINGS BANK'S (I) MOTION TO
DISMISS PLAINTIFF'S THIRD AND FIFTH CLAIMS FOR RELIEF
PURSUANT TO FED. R. BANKR. P. 7012, 7008 AND 7009, AND FED.
R. CIV. P. 12(b)(1), 12(b)(6), 8(a) AND 9(b), AND (II) JOINDER IN
DEFENDANT 11 EAST 36TH NOTE BUYER LLC'S MOTION TO
DISMISS TO THE EXTENT IT SEEKS DISMISSAL OF PLAINTIFF'S
FIRST AND SECOND CLAIMS FOR RELIEF**

PLEASE TAKE NOTICE, that upon the motion dated March 28, 2014 (the "Motion") of First Central Savings Bank ("FCSB"), by its counsel, Spizz Cohen & Serchuk, P.C., and upon FCSB's accompanying memorandum of law, the undersigned shall move this Court before the Honorable Robert E. Grossman, United States Bankruptcy Judge, in his courtroom at the United States Bankruptcy Court, Southern District of New York, One Bowling Green, New York, New York 10004 on the **17th day of June, 2014 at 10:00 A.M.** (the "Hearing"), or as soon thereafter as counsel can be heard, for an order dismissing the Third and Fifth Claims for Relief against FCSB, pursuant to Rules 7012, 7008 and 7009 of the Federal Rules of Bankruptcy Procedure, and Fed.R.Civ.P. 12(b)(1), 12(b)(6), 8(a), and 9(b).

PLEASE TAKE FURTHER NOTICE, that FCSB's Motion also joins in and incorporates by reference the motion of defendant 11 East 36th Note Buyer LLC to the extent it seeks to dismiss the Plaintiff's First and Second Claims for Relief.

PLEASE TAKE FURTHER NOTICE, that any objections to the Motion must be filed with the Clerk of the Bankruptcy Court with a copy delivered to the Chambers of the Honorable Robert E. Grossman and served upon: (i) Spizz Cohen & Serchuk, P.C., attorneys for FCSB, 425 Park Avenue, New York, New York 10022, Attn: Alex Spizz, Esq. and Jill Makower, Esq.; (ii) Morrison Tenebaum PLLC, attorneys for Plaintiff 11 East 36th, LLC and Morgan Lofts, LLC, 87 Walker Street, New York, New York 10013, Attn: Lawrence F. Morrison, Esq.; (iii) Backenroth Frankel & Krinsky, LLP, attorneys for Defendant 11 East 36th Note Buyer LLC, 800 Third Avenue, 11th Floor, New York, New York 10022, Attn: Mark A. Frankel, Esq.; (iv) Hoguet Newman Regal & Kenney LLP, attorneys for Defendant Mission Capital Advisors LLC, 10 E. 40th Street, 35th Floor, New

York, New York 10013, Attn: Damian R. Cavaleri, Esq.; and (v) the Office of the United States Trustee for the Southern District of New York, 201 Varick Street, Suite 1006, New York, New York 10014, Attn: Andrew D. Velez-Rivera, Esq., so as to be received at least seven (7) days before the Hearing date.

Dated: New York, New York
March 28, 2014

SPIZZ COHEN & SERCHUK, P.C.
Attorneys for Defendant
First Central Savings Bank

By: 
Alex Spizz, Esq.
Jill Makower, Esq.
425 Park Avenue, 5th Floor
New York, NY 10022
(212) 754-9400

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

11 EAST 36TH, LLC,

Debtor.

Chapter 11
Case No. 13-11506 (RG)

In re:

MORGAN LOFTS, LLC,

Debtor.

Chapter 11
Case No. 13-11507 (RG)

(Jointly Administered)

11 EAST 36TH, LLC,

Plaintiff,

Adv. Pro. No. 14-01819 (RG)

v.

FIRST CENTRAL SAVINGS BANK,
11 EAST 36TH NOTE BUYER LLC, and
MISSION CAPITAL ADVISORS LLC,

Defendants.

**FIRST CENTRAL SAVINGS BANK'S (I) MOTION TO DISMISS
PLAINTIFF'S THIRD AND FIFTH CLAIMS FOR RELIEF PURSUANT
TO FED. R. BANKR. P. 7012, 7008 AND 7009, AND FED. R. CIV. P.
12(b)(1), 12(b)(6), 8(a) AND 9(b), AND (II) JOINDER IN DEFENDANT
11 EAST 36TH NOTE BUYER LLC'S MOTION TO DISMISS TO THE
EXTENT IT SEEKS DISMISSAL OF PLAINTIFF'S FIRST AND
SECOND CLAIMS FOR RELIEF**

First Central Savings Bank ("FCSB"), a defendant in the above-captioned adversary proceeding (the "Adversary Proceeding") commenced by 11 East 36th, LLC (the "Plaintiff"), submits this (i) motion and FCSB's supporting memorandum of law to dismiss Plaintiff's Third and Fifth Claims For Relief pursuant to Rules 12(b)(1), 12(b)(6), 8(a) and 9(b) of the Federal Rules of Civil Procedure, made applicable herein by virtue of Rules 7012, 7008 and 7009 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and (ii) joinder in defendant 11 East 36th Note Buyer LLC's ("Note Buyer") motion to dismiss to the extent it seeks to dismiss the Plaintiff's First and Second Claims for Relief, and respectfully represents:

I. SUMMARY OF FACTS

A. General

1. On May 8, 2013 (the "Petition Date"), Plaintiff filed a Chapter 11 case in this Court, Case No. 13-11506 (RG), and Plaintiff's affiliate, Morgan Lofts, LLC ("ML") also filed a Chapter 11 case in this Court, Case No. 13-11507(RG). Plaintiff's Chapter 11 case and ML's Chapter 11 case are being jointly administered pursuant to order entered on July 24, 2013. (Complaint, ¶¶ 6-7).

2. Prior to the Petition Date, FCSB held a mortgage (the "Blanket Mortgage"),¹ encumbering the condominium units at the Morgan Lofts Condominiums located at 11 East 36th Street in New York, New York (the "Premises").

¹ A copy of the Blanket Mortgage is annexed to the Complaint as Exhibit "A."

3. The obligors with respect to the obligations secured by the Blanket Mortgage are Plaintiff, ML and their affiliate, Bay Condos, LLC ("Bay Condos").² (Plaintiff, ML and Bay Condos are collectively referred to herein as the "Debtors").

4. The Plaintiff's complaint herein ("Complaint") alleges that the Premises includes twenty (20) residential units and two (2) commercial units, and one cellar unit. (Complaint, ¶9). According to the Plaintiff, Units 101 and 102 at the Premises are owned 2.8% by the Plaintiff, and 97.2% by Bay Condos. See Docket No. 42, ¶8 (stating that Plaintiff "possesses a 2.8 % ownership interest in unit 101 as well as unit 102, and Bay Condos possesses a 97.2 % ownership interest in both units.").

5. By Assignment of Mortgage dated April 24, 2012,³ FCSB assigned the Blanket Mortgage to defendant Note Buyer. Therefore, as of the Petition Date, FCSB held no interest in the Blanket Mortgage. (See Complaint ¶53).

B. The Adversary Proceeding

6. On February 7, 2014, Plaintiff filed this Adversary Proceeding against FCSB, Note Buyer and Mission Capital Advisors LLC (collectively, the "Defendants").

II. SUMMARY OF ARGUMENT

7. Plaintiff's Third Claim for Relief alleges fraud. This cause of action is predicated on a scheme (alleged in Paragraphs 25-29 of the Complaint) whereby FCSB refused to allow Plaintiff to sell Units 101 and 102 (in contravention of the release of lien provision of the Blanket Mortgage) and made misrepresentations to potential buyers as to the status of the loan, in order to use the loan as a

² Bay Condos is a debtor in Case No. 11-15844 (the "Bay Condos Case") filed on December 22, 2011, and still pending in this Court.

³ A copy of the Assignment of Mortgage is annexed to the Plaintiff's Complaint as Exhibit "B."

“carrot’ to entice potential buyers to buy FCSB’s *entire* loan package as a whole which - with the exception of Plaintiff’s note - were all listed as non-performing.”

(Complaint, ¶26).

8. As set forth in FCSB’s memorandum of law, the Third Claim for Relief should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim and to meet the pleading requirements of Fed.R.Civ.P. 8(a). The Third Claim for Relief fails to state a cause of action for fraud upon the following grounds:

- (i) Misrepresentations To The Potential Buyers, Upon Which Plaintiff Did Not Claim To Rely, Cannot Form The Basis Of A Fraud Cause of Action
- (ii) Lack of First-Party Reliance On The Alleged Misrepresentations
- (iii) Third-Party Reliance On The Alleged Misrepresentations Was Not Sufficiently Alleged; and
- (iv) Plaintiff Did Not Sufficiently Allege Injury From The Alleged Misrepresentations

9. The Plaintiff’s Third Claim for Relief should also be dismissed pursuant to Fed.R.Civ.P. 9(b) for failure to allege fraud with particularity.

10. The Fifth Claim for Relief, which seeks a declaratory judgment, should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) based on lack of subject matter jurisdiction. The Fifth Claim for Relief does not fall within this Court’s subject matter jurisdiction because there is no actual controversy, and it improperly seeks an advisory opinion.

III. JOINDER IN 11 EAST 36TH NOTE BUYER LLC’S MOTION TO DISMISS THE FIRST AND SECOND CAUSES OF ACTION

11. FCSB hereby joins in and incorporates by reference Note Buyer’s motion to dismiss to the extent it seeks to dismiss the First and Second Claims for Relief.

CONCLUSION

12. Based upon this motion and upon the motion to dismiss filed by defendant Note Buyer, FCSB respectfully requests that the Court (i) dismiss Plaintiff's First, Second, Third and Fifth Claims For Relief in this Adversary Proceeding, pursuant to Rules 12(b)(1), 12(b)(6), 8(a) and 9(b) of the Federal Rules of Civil Procedure, and (ii) grant such other and further relief as is just and proper.

Dated: New York, New York
March 28, 2014

SPIZZ COHEN & SERCHUK, P.C.
Attorneys for Defendant
First Central Savings Bank

By: 
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Jill Makower, Esq.
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